82-6438

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ALEXANDER L. STEVAS,
CLERK

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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LEVIS LEON ALDRIDGE,

Petitioner,

vs

STATE OF FLORIDA,

Respondent.

==========

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Supreme Court of Florida

No. 61,673

LEVIS LEON ALDRIDGE, Appellant,

vs.

STATE OF Florida, Appellee.

[December 22, 1982]

PER CURIAM.

This is an appeal from a denial of appellant's Rule 3.850 post-conviction relief motion to vacate judgment and sentence of death on the ground that he was not afforded reasonably effective assistance of counsel at trial. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm.

Appellant was convicted and sentenced to death by the trial court on January 8, 1976. This Court affirmed the conviction and sentence in Aldridge v. State, 351 So. 2d 942 (Fla. 1977), cert. denied, 439 U.S. 882 (1978)(Aldridge I). For the purpose of this opinion, the facts leading to appellant's conviction and sentence are briefly restated. Appellant, while on parole after serving approximately ten years in prison, was employed and befriended by Robert Ward, who worked in a restaurant. Having borrowed a shotgun and shells, appellant robbed the restaurant, and during the commission of the robbery, Ward was struck in the head and killed by at least one of three shots fired by appellant. Appellant was convicted of first-degree murder, and the jury recommended imposition of the

death penalty. The trial judge, finding no mitigating circumstances, and concluding that the murder was heinous, atrocious, and cruel, followed the jury's recommendation and sentenced appellant to death. In the appeal before this Court, appellant sought reversal of his conviction, raising three points: the admission of prejudicial photographs; the trial court's direction requiring a unanimous verdict; and the trial court's instruction on second-degree felony murder. We affirmed, holding that (1) the photographs were admissible as relevant and were not so objectionable and inflammatory as to require reversal; (2) the requirement of a unanimous verdict did not prejudice the defendant; and, (3) the reading of the second-degree felony murder instructions was not error. Appellant also claimed error in the sentencing phase, asserting that the trial court improperly found that the crime was heinous, atrocious, and cruel. This Court found no error in the sentencing phase and noted that appellant was under a sentence of imprisonment at the time of the murder, and that the murder was committed during the commission of a robbery.

Subsequent to this Court's opinion on the merits, the appellant, on October 29, 1979, filed an application for relief under this Court's all writs jurisdiction, claiming that this Court, in considering the appeal of his conviction and sentence, improperly found two aggravating circumstances which had not been found by the trial judge. We denied relief in an unreported order (Aldridge II) on December 21, 1979, and appellant's petition for certiorari to the United States Supreme Court on this issue was also denied. Aldridge v. Florida, 449 U.S. 891 (1980).

While appellant's application for relief filed under this Court's all writs jurisdiction was pending, the appellant, on November 2, 1979, filed a Rule 3.850 motion in the trial court, seeking to have his judgment and sentence vacated. In this motion, appellant contended that the death sentence was imposed on him in violation of the United States and Florida

constitutions and that he was denied effective assistance of counsel at trial. While this 3.850 motion was pending in the trial court, the governor, on June 16, 1981, signed a death warrant authorizing appellant's execution on July 15, 1981. The trial court, on June 18, 1981, denied appellant's motion without conducting an evidentiary hearing. In an expedited appeal, this Court reversed the trial court's order and granted a stay of execution on the grounds that an evidentiary hearing was required on the issue of effectiveness of trial counsel. The case was remanded for that purpose and relief on all other grounds was denied. Aldridge v. State, 402 So. 2d 507 (Fla. 1981)(Aldridge III).

The subject of this appeal is the trial court's finding after an evidentiary hearing in this Aldridge IV proceeding, that appellant had reasonably effective assistance of counsel at trial. At the evidentiary hearing, the trial court followed the standard established in Knight v. State, 394 So. 2d 997 (Fla. 1981), and found "[t]hat [appellant] has shown that the specific omission of trial counsels' failing to take pre-trial depositions upon oral examination of the State's main witnesses was a substantial and serious deficiency measurably below that of competent counsel." The trial judge concluded, however, "[t]hat [appellant] has not shown that this specific deficiency . . . when considered under the circumstances of this individual case, was substantial enough to demonstrate a prejudice to the [appellant] to the extent that there is a likelihood that this deficient conduct effected [sic] the outcome of the trial." Consequently, the trial judge denied appellant's post-conviction relief motion.

Appellant contends that he was denied effective assistance of counsel in four respects. First, appellant asserts that he was denied the right to counsel during pre-trial preparations by the assignment of a non-lawyer to represent him. Second, appellant contends that the trial court denied him effective assistance of counsel by refusing to appoint an attorney from

outside the public defender's office to represent appellant. Third, appellant contends that the denial of the public defender's motion for a continuance, which was filed immediately before trial, was prejudicial error which counsel should have raised on appeal. Fourth, appellant cites several specific acts and omissions on the part of appointed counsel, particularly the failure to depose witnesses, which he contends show that, under the totality of the circumstances, he was not provided effective assistance of counsel.

On the first point, appellant alleges that a part-time legal intern, not licensed to practice law, was assigned to his case and not properly supervised by a member of the bar. As a result, appellant contends, valuable preparatory work, such as the filing of motions and the taking of depositions, was not done. At the evidentiary hearing, the public defender testified that he was in charge of appellant's case and that the intern was merely assisting him in his preparation for trial. We agree with appellant that an accused in a criminal case has a right to counsel at every important stage of the proceedings, but find that appellant was not denied the assistance of counsel at the preparation stage or at any other stage of his trial.

In his second point, appellant asserts that conflict developed between himself and his appointed counsel, and that the trial court, after being informed of this conflict, erred in not appointing counsel from outside the public defender's office. Because the public defender's office is considered a "firm," appellant argues, whenever conflict arises, counsel not affiliated with the particular public defender's office must be appointed. We reject this contention. We find that appellant has misconstrued the meaning of conflict in this situation. In Babb v. Edwards, 412 So. 2d 859 (Fla. 1982), and Turner v. State, 340 So. 2d 132 (Fla. 2d DCA 1976), conflict in a public defender's office arose out of multiple representation, and in Roberts v. State, 345 So. 2d 837 (Fla. 3d DCA 1977), conflict was created when an assistant public defender was called to testify

against a defendant represented by another assistant public defender working in the same office. The asserted conflict in this case arose out of appellant's fear that appointed counsel would make a "deal" for him, and his belief that appointed counsel had failed to properly investigate a state witness appellant contended was lying. This type of asserted individual conflict or personal disagreement does not mandate that new counsel be appointed by the court. It is clearly distinguishable from either Turner or Roberts, and there was no error in the trial court's refusal to appoint new counsel from outside the public defender's office. Furthermore, in this case the record reflects that once the public defender explained to appellant that the state witness was being investigated and that no "deal" could be made without appellant's consent, appellant acquiesced in the continued representation by the public defender's office.

Appellant's third contention is that the trial court erred in denying the motion for continuance. Although trial and appellate counsel now claim that the denial of the continuance was error, neither thought enough of this issue to raise it in post-trial motions or designate it as an issue on appeal. Nothing has been shown to this Court concerning what evidence could have been discovered had the continuance been granted or what would have been done differently if counsel had been afforded a continuance. No prejudice has been shown to have resulted from the denial of the motion for continuance, which is an issue that could have been raised in the original appeal. See Valle v. State, 394 So. 2d 1004 (Fla. 1981). To allow this issue to now be considered on the facts of this case affords counsel an opportunity to keep an issue in reserve for post-conviction relief proceedings. Since this was an issue which could have been raised on appeal, it is not a proper subject for post-conviction relief. See Zeigler v. State, 402 So. 2d 365 (Fla. 1981) cert. denied, 102 S. Ct. 1739 (1982); Spenkelink v. State, 350 So. 2d 85 (Fla.), cert. denied, 434 U.S. 960 (1977); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert.

denied, 440 U.S. 976 (1979). Further, there being no specific prejudice shown, the failure to raise the issue on appeal cannot be a basis for a finding of ineffective assistance of counsel under the test adopted by this Court in Knight v. State, 394 So. 2d 997 (Fla. 1981).

Appellant's fourth point concerns appointed counsel's failure to take the formal depositions of state witnesses under Florida's criminal discovery rules. The test for determining whether effective assistance of counsel has been provided, as expressed in Knight, requires a defendant to show that a "specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel." 394 So. 2d at 1001. The trial judge found that appointed counsel's failure to take formal depositions under the criminal rules was a substantial and serious deficiency. Although we agree that the failure to take depositions requires an inquiry, it does not necessarily follow that this conduct in itself necessitates a finding of ineffective assistance of counsel or prejudice to appellant. This is particularly so when defense counsel, as was the case here, had sworn statements from each of the witnesses who testified and there is no showing as to what other information would have been provided to defense counsel through the use of depositions. In our view, the record clearly fails "to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings." Id. Appellant has made no attempt whatever to present any evidence to indicate what information would have been elicited in taking the depositions which would have affected the outcome of his trial. Again, appellant has failed to show the required prejudice under Knight.

We previously rejected all the other alleged defects in the instant case when we remanded appellant's initial Rule 3.850 motion for an evidentiary hearing on the issue of the effectiveness of trial counsel.

For the reasons expressed, the trial court's denial of appellant's Rule 3.850 motion is affirmed.

It is so ordered.

ADKINS, Acting Chief Justice, BOYD, OVERTON, McDONALD and EHRLICH, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for St. Lucie County,

Dwight L. Geiger, Judge - Case No. 74-335 CF

Richard L. Jorandby, Public Defender and Jerry L. Schwarz, Assistant Public Defender, West Palm Beach, Florida,

for Appellant

Jim Smith, Attorney General and Gregory C. Smith, Assistant Attorney General, Tallahassee, Florida,

for Appellee

Supreme Court of Florida

TUESDAY, FEBRUARY 22, 1983

LEVIS LEON ALDRIDGE,	:	
Appellant,	:	CASE NO. 61,673
v.	:	Circuit Court No. 74-335 CF (St. Lucie)
STATE OF FLORIDA,	:	
Appellee.	:	

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied, and it is further

ORDERED Appellant's Application for Stay of Mandate is granted and proceedings in this Court and in the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida are hereby stayed to and including March 24, 1983, to allow appellant to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Janice Carole
Deputy Clerk

TC
cc: Hon. Roger Poitras, Clerk
Hon. Dwight L. Geiger, Judge

Craig S. Barnard, Esquire
Gregory C. Smith, Esquire

IN THE SUPREME COURT OF FLORIDA

TUESDAY, JULY 7, 1981

LEVIS LEON ALDRIDGE,	**	
Appellant,	**	CASE NO. 60,610
vs.	**	Circuit Court Case No. 74-335-CF (St. Lucie)
STATE OF FLORIDA,	**	
Appellee.	**	

The Application for Stay of Execution filed June 29, 1981, is granted and appellant's execution is hereby stayed.

Upon review of the Record, the Application for Stay of Execution and the Response of the State, the order of the trial court is reversed and this cause is remanded for an evidentiary hearing with respect to the issue of effectiveness of trial counsel. Fla. R. App. P. 9.140(g).

SUNDBERG, C.J., OVERTON, ENGLAND and McDONALD, JJ., Concur
ADKINS and BOYD, JJ., Dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

cc: Hon. Roger Poitras, Clerk
Hon. Royce R. Lewis, Judge

Craig S. Barnard, Esquire
and Jerry L. Schwarz, Esquire
Miguel A. Olivella, Jr., Esquire

FLORIDA DECISIONS WITHOUT PUBLISHED OPINIONS

SUPREME COURT

Title	Docket Number	* Date	Disposition	** Appeal from and Citation
Aetna Casualty and Surety Co. v. Special Disability Trust Fund, State of Florida	60621	8/ 5/81	Pet. for rev. den.	1st DCA 397 So.2d 381
Agnitsch v. Cypress Community Hospital, Inc.	60600	8/ 5/81	Pet. for rev. den.	4th DCA 395 So.2d 1167
Albelo v. State	60815	6/30/81	App. dism.	3d DCA 400 So.2d 1342
Aldridge v. State	60810	7/ 7/81	Revd. & rem.	Cir. Ct. (St. Lucie)
Allen v. Arizona Properties Marketing Co., Inc.	60355	6/30/81	Pet. for rev. den.	1st DCA 392 So.2d 1359
American Hardware Mutual Insurance Co. v. Contreras	60472	7/10/81	Pet. for rev. den.	3d DCA 395 So.2d 179
Anderson v. Martincic	60527	6/23/81	Pet. for rev. dism.	5th DCA 386 So.2d 13
Armbrister v. Department of Health and Rehabilitative Services	60801	6/29/81	Pet. for rev. dism.	1st DCA
Austin v. Austin's Rack, Inc.	60653	8/ 5/81	Pet. for rev. den.	3d DCA 396 So.2d 1161
Bailey v. Johnson	60833	7/ 7/81	Dism.	4th DCA
Bailey v. Johnson	60912	7/27/81	Pet. for rev. dism.	4th DCA
Bailey v. State	60410	7/22/81	Pet. for rev. den.	3d DCA 393 So.2d 24
Baker v. Baker	60485	7/21/81	Pet. for rev. den.	4th DCA 394 So.2d 465
Bay Memorial Center v. Stepien	60741	6/30/81	Pet. for rev. dism.	1st DCA 397 So.2d 333
Becerra v. State	60593	6/30/81	Cert. dism.	
Behar v. Southeast Bank Trust Co., N.A.	60775	6/19/81	Pet. for rev. dism.	3d DCA
Berlin v. Berlin	60535	7/27/81	Pet. for rev. den.	3d DCA 395 So.2d 1260
Bernard v. Florida East Coast Railway Co.	59973	5/20/81	Dism.	5th DCA

* Date of decision or date rehearing denied (if requested)
** Court or agency rendering decision appealed and citation (if reported)

Levis Leon ALDRIDGE, Petitioner,

v.

STATE of Florida, Respondent.

No. 46958.

Supreme Court of Florida.

June 9, 1977.

Rehearing Denied Dec. 5, 1977.

Defendant was convicted in the Circuit Court, St. Lucie County, Wallace Sample, J., of first-degree murder and sentenced to death. Defendant appealed, and the Supreme Court held that: (1) a photograph depicting the murder victim's body was properly admitted; (2) under the circumstances, no error resulted from the trial court's direction to the jury that it must find a unanimous verdict; (3) it was not reversible error for the trial court to read to the jury a set of standard form instructions on second-degree felony-murder which had the net effect of barring a conviction for second-degree felony-murder, and (4) the circumstances warranted the death penalty.

Conviction and sentence affirmed.

Boyd, J., dissented and filed opinion.

Hatchett, J., dissented.

1. Criminal Law ⇨438(7)

Where allegedly gruesome photograph of murder victim's body was relevant to the details of the events which led to crime in

that it showed the location of the victim's body in relation to the restaurant which had been robbed, photograph was properly admitted in evidence, in first-degree murder prosecution, despite fact that both sides had stipulated to the date and place of death.

2. Criminal Law ⇐822(4)

When considered in the context of the entire charge, instruction that jury was required to find a unanimous verdict did not place pressure on jurors to return a verdict to which they did not agree and did not require reversal of first-degree murder conviction.

3. Homicide ⇐308(1)

Standard form instructions on second-degree felony-murder which have net effect of barring conviction for second-degree felony-murder are proper where the perpetrator of the independent felony also committed the homicide.

4. Homicide ⇐340(4)

Where verdict, in first-degree murder prosecution, indicated that jury found that defendant had killed the victim while in the course of committing a robbery, a form of murder described in the relevant statute as "first degree," no reversible error resulted from fact that trial court read to the jury a set of standard form instructions on a second-degree felony-murder which had net effect of barring conviction for second-degree felony. West's F.S.A. § 782.04(1)(a).

5. Homicide ⇐354

Where defendant was already under a sentence of imprisonment when he committed the murder for which he was sentenced to death and where the capital felony was committed while defendant was engaged in the commission of a robbery and there were no mitigating circumstances, death penalty was warranted. West's F.S.A. § 782.04(1)(a).

6. Criminal Law ⇐1068½

Supreme Court has duty to review the record in every case where the death penalty is imposed. West's F.S.A. § 921.141(4).

Richard L. Jorandby, Public Defender, and Craig S. Barnard, Asst. Public Defender, for petitioner.

Robert L. Shevin, Atty. Gen., and A. S. Johnston, Asst. Atty. Gen., for respondent.

PER CURIAM.

This case is here on direct appeal from the first degree murder conviction of Leon Aldridge and the imposition of a sentence of death. The trial court's sentence was preceded by a death sentence recommendation of a jury. Our jurisdiction to review this case is based on Article V, § 3(b)(1), of the Florida Constitution, and Section 921.141(4), Florida Statutes (1975).

The facts giving rise to Aldridge's conviction are not relevant to the points on appeal except insofar as they bear on the imposition of the death sentence. Aldridge previously had been convicted of a felony. While on parole, and after serving approximately 10 years in prison, he had been employed and befriended by the murder victim. The evidence at trial showed that Aldridge had planned to rob the victim's restaurant, and that he had borrowed a shotgun and shells in advance. During the commission of the robbery, three shotgun blasts were fired at the victim as he left the rear of the restaurant to enter his car. At least one of the blasts struck him in the head.

[1] Aldridge argues for reversal of his conviction on three points, the first of which is the introduction of an allegedly "gruesome" photograph showing the victim's body near his automobile at the rear of his restaurant. The photograph was introduced despite the fact that both sides had stipulated to the date and place of death. We agree with the trial judge's ruling on admissibility. The test for admission in Florida is "relevance".[1] The photograph here was relevant to the details of the events leading up to the crime, in that

1. *Young v. State*, 234 So.2d 341 (Fla.1970).

it showed the location of the victim's body in relation to the restaurant which had been robbed. This one photograph was not so objectional and inflammatory that the trial jury's verdict of guilt should be set aside. See *Halliwell v. State*, 323 So.2d 557 (Fla. 1975); *Funchess v. State*, 341 So.2d 762 (Fla.1976).

[2] Aldridge raises two points on appeal relative to charges given to the jury. The first involves a direction to the jury that it must find a unanimous verdict. Aldridge contends this instruction deprived him of the right to a so-called "hung" jury. In oral argument, Aldridge's counsel conceded that this point alone could not stand independently as a basis for reversal. We agree. When this instruction is considered in the context of the whole charge, it is clear that no pressure was placed on the jurors to return a verdict to which they did not agree. This case is not analogous, as Aldridge contends, to *Jones v. State*, 92 So.2d 261 (Fla.1956).

[3, 4] Aldridge also attacks the trial judge's instruction on second degree felony murder. In this case, just as in *Adams v. State*, 341 So.2d 765 (Fla.1976), the trial judge read to the jury a set of standard form instructions which had the net effect of barring a conviction for second degree felony murder. As we stated in *Adams*, however, those instructions are proper where the perpetrator of the independent felony (robbery here) also committed the homicide. The verdict indicates the jury found that Aldridge had killed a man while in the course of committing a robbery, a form of murder described as "first degree" in Section 782.04(1)(a), Florida Statutes (1973). There was no reversible error.

[5, 6] Aldridge's final points on appeal relate to the imposition of a death penalty. He asserts the unconstitutionality of the death penalty statute, which has already been resolved against him in other cases,[2] and the alleged error of the trial judge in describing the crime as heinous and atrocious in his written findings of aggravating and mitigating circumstances. We deem it unnecessary to pass upon Aldridge's challenge to the "heinous" finding of the trial judge[3] inasmuch as there were no mitigating circumstances[4] and adequate aggravating circumstances to sustain the penalty. Aldridge was at the time of the murder already under a sentence of imprisonment, and the capital felony was committed while Aldridge was engaged in the commission of a robbery.

For these reasons, we must conclude, as did the jury and the trial court, that the aggravating circumstances preponderate and the death penalty was warranted. The conviction and sentence are affirmed.

OVERTON, C. J., and ADKINS, ENGLAND and SUNDBERG, JJ., concur.

BOYD, J., dissents with an opinion.

HATCHETT, J., dissents.

BOYD, Justice, dissenting.

For two reasons I must respectfully dissent.

First, the only testimony of substance tying appellant to the crime was given by a convicted felon who had purchased and possessed the murder weapon in violation of conditions of his own parole. The witness admitted at trial that he had committed perjury by lying under oath to police in connection with statements made about this

2. *Alford v. State*, 307 So.2d 433 (Fla.1975); *Dixon v. State*, 283 So.2d 1 (Fla.1973). See also, *Proffitt v. State*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

3. But see *Halliwell v. State*, 323 So.2d 557 (Fla. 1975), as to the meaning of "heinous" and "atrocious" in our death penalty statute.

4. In this case, the trial court found no mitigating circumstances and Aldridge does not contest that finding on appeal. Rather, Aldridge, through his counsel, admitted the lack of mitigating circumstances and specifically requested the trial judge to impose the death penalty rather than incarcerating him for the minimum 25 years under our life sentence statute. This request, of course, has no bearing on our decision. We have a duty to review the record in every case where the death penalty is imposed. § 921.141(4), Fla.Stat. (1975).

crime. He further admitted he feared being returned to prison for buying and lending the death weapon to appellant. He had compelling reasons to implicate appellant or anyone else in the crime, since his gun was proven to have been used in the killing.

It very well may be true that appellant is the murderer, but the evidence submitted at the trial fails to constitute proof of guilt beyond and to the exclusion of reasonable doubt.

Under the statute of this State prescribing the procedures for imposition of sentences for capital felonies, Section 921.-141, Florida Statutes, this Court is not permitted to approve a sentence of death until each case is weighed by the criteria stated in the statute. The facts shown in the record do not afford a lawful basis for conviction or infliction of capital punishment.

Second, even if the evidence had been sufficient to convict, I think a finding of first degree murder would have been improper. The trial court charged the jury that it could not find the defendant guilty of second degree murder if it found the murder to have occurred during the perpetration of a robbery. This charge was directly contrary to the statute on second degree murder then in existence, Section 782.04(2), Florida Statutes (1973).[1] See my dissent in *Adams v. State*, Fla., 341 So.2d 765 opinion filed December 16, 1976.

Normally, I would feel bound by the precedent of *Adams, supra*. However, human life is so precious that I cannot concur in an opinion which sends a condemned person to death after instruction to the jury in direct conflict with the statute.

1. (2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful

CHAPTER 921

SENTENCE

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon

the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8663(246); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353.

Note.—Former s. 919.23.